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# Bail as a Matter of Right--In Re Underwood

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# BAIL AS A MATTER OF RIGHT— IN RE UNDERWOOD

For the last few years the debate over pretrial detention versus bail as a matter of right has continued unabated. The rising crime rate has intensified the resolve of those who feel that we must detain "dangerous" persons for the protection of society. On the other hand, the critics of preventive detention argue that the "dangerousness" of released persons is not predictable with certainty and that by allowing a procedure such as preventive detention, we ultimately encroach upon the constitutional rights of everyone, including the "threatened" majority.

Most of the debate regarding preventive detention has centered around federal legislation and federal constitutional construction. Such interpretations are relevant to any discussion of bail as a matter of right as they may well have an ultimate effect upon state action, especially if the United States Supreme Court determines that Eighth Amendment guarantees require the states as well as the federal government to grant bail as a matter of right in all noncapital cases. Presently, however, this controversy over preventive detention is not directly relevant in the great majority of the states. That is, the state constitutional provisions are often more restrictive on the power of their governments to restrict bail than is their federal counterpart.

While this note will discuss some of the arguments both for and against preventive detention, its primary focus will be to analyze state constitutional guarantees to bail as a matter of right with emphasis on California law. The California Supreme Court settled the controversy within its jurisdiction in the case of *In re Underwood*[1] by holding that the state constitution requires the granting of bail as a matter of right in all noncapital cases and that there is no "public safety" exception.

The body of this note will illustrate that state guarantees are more specific than federal guarantees and thus there is less room for arguable debate as to their meaning. However, there are still some questions which must be resolved concerning the right to bail: Is it an absolute right, or are there exceptions such as revocation of the right for abuse or violation of the conditions of bail? How is the right affected by the elimination of the death penalty? What is to be done with persons who are known to be "dangerous"?

1. 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

## The In Re Underwood Case

The scenario of the *Underwood* case was typical of those involving "dangerous" suspects. On June 20, 1972, the defendant was arrested and charged with possession of a sawed-off shotgun. Bond was set at $500, and, upon the defendant's posting of bail, he was released. A few days later the suspect was rearrested and charged with the following offenses: possession of a sawed-off shotgun, attempt to explode a destructive device with intent to commit murder and attempted murder, attempt to explode a destructive device with intent to injure people or property, and possession of a destructive device. The state alleged that the defendant had attempted to mail a package containing a live "pipe bomb" to the police station where the arresting officers for the first offense were stationed.

At the time of the defendant's arraignment, the prosecutor indicated to the court that the defendant was already at liberty on bail in a pending case involving a similar charge, and because of that "pending case" and the gravity of the offense in the instant case, the district attorney recommended that no bail be set. Thereafter the magistrate denied bail on the grounds that the defendant was a danger to himself and to others and ordered him held to answer in the superior court. The superior court judge also denied bail stating:

> Due to the fact that there is a dearth of legal opinion in the matter it is usually up to the judge to make a decision. If the judge doesn't make a decision we never have any new law. If I am reversed I have been reversed before and I believe will be again. But I am not afraid to make a decision if I believe in that one. I believe as Justice Douglas stated where the safety of the community would be jeopardized it would be irresponsible judicial action to grant bail[2]. . . . The time has come where we must restrain violence and death as much as possible. If it is necessary to resolve it by denying bail to those who can or are able to perpetrate murders and violence and crimes of that nature, then the court at this time will not be reluctant to deny bail, and bail is denied. Let the District Court of Appeal make their ruling.[3]

The judge of the superior court had reason to be unsure of the soundness of his ruling because there was great confusion in the law as to the nature of the right to bail. This confusion was grounded in a conflict between the constitutional guarantee and the developing case law. The California Constitution was seemingly clear:

> All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required . . . .[4]

2. The trial court here was relying on Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962).

3. Record at 11, 9 Cal. 3d 345, 508 P2.d 721, 107 Cal. Rptr. 401 (1973); *id.* at 347, 508 P.2d at 722, 107 Cal. Rptr. at 402.

4. CAL. CONST. art. I, § 6.

The case law, however, indicated that if there was a danger posed to the public safety, the defendant could be preventively detained—that is, denied bail.[5]

The ultimate issue faced by the superior court judge was how the defendant could be detained when none of his alleged offenses was a capital crime, and article I, section 6 of the California Constitution therefore entitled him to be released on bail as a matter of right. The statutes enacted thereunder were in agreement.[6] But the defendant appeared to pose a public safety hazard and the case law indicated he *could* be held without bail.[7] The defendant argued that there was no statutory or constitutional provision of the state of California which permitted the denial of pretrial bail in noncapital cases; nor was pretrial bail a matter of judicial discretion. Hence he had to be granted bail as a matter of right before his trial.[8]

Of course the obvious effect of the denial of bail was to leave the defendant incarcerated before trial for what he contended were bailable charges. It was therefore argued that the defendant was deprived of his fundamental constitutional rights to bail and that those denials, imprisonment and restraint, were in violation of due process of law guaranteed to all citizens under article I, section 6 of the California Constitution, and under the Fifth and Fourteenth Amendments of the federal Constitution.[9] It was further contended that denial of or delay in setting bail was unconscionable in that it would permit the defendant to languish in custody, thereby impairing his ability to assist in the preparation of his defense for trial, as well as occasioning an additional violation of due process each day that his right to bail was denied.

The California Supreme Court reversed the lower court ruling and held that bail in noncapital cases was a mater of right and that there was no public safety exception. The supreme court relied solely on the language of article I, section 6 of the California Constitution and enabling legislation enacted thereunder. It distinguished the federal constitutional guarantees under the Eighth Amendment by saying:

> Our constitutional language expressly providing that all persons shall be bailable except for a capital offense was consciously *added* to the 'no excessive bail' language adopted from the Eighth Amend-

5. *See, e.g.*, Bean v. County of Los Angeles, 252 Cal. App. 2d 754, 757, 60 Cal. Rptr. 804, 807 (1967).

6. *See* CAL. PEN. CODE §§ 1270, 1271 (West 1970).

7. *See, e.g.*, Bean v. County of Los Angeles, 252 Cal. App. 2d 754, 60 Cal. Rptr. 804 (1967); Evans v. Municipal Court, 207 Cal. App. 2d 633, 24 Cal. Rptr. 633 (1962); *In re* Gentry, 206 Cal. App. 2d 723, 24 Cal. Rptr. 208 (1962); *In re* Henley, 18 Cal. App. 1, 121 P. 933 (1912).

8. Brief for Petitioner at 2, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

9. *Id.* at 13.

> ment in order to make clear that, unlike the federal rule, all except the one class of defendants were to be bailable.[10]

Thus, the detention of persons dangerous to themselves or to others is *not* within the contemplation of the California criminal bail system, and if it becomes necessary to detain such persons, authorization for it must be found elsewhere—either in existing law[11] or future provisions of the law.[12] As the court said in *In re Keddy*, "If the constitutional guaranties are wrong, let the people change them—not judges or legislators."[13]

In considering alternative provisions, the supreme court recognized that there was a civil commitment procedure for individuals who fall into certain categories;[14] but as the dissent noted, these provisions of the Welfare and Institutions Code would not apply to the "cold-blooded, professional criminal, and yet it is precisely such an individual who poses the greatest threat of harm."[15] Thus, the problem is framed: What do we do with the known dangerous person who attempts to kill three people in a supermarket and fails? If we release him on bail and he attempts to kill three more people the next day and is rearrested, do we have to release him again? Theoretically, the crime spree could go on ad infinitum until the accused could finally be brought to trial or until he committed a capital offense. The problem, of course, is that the likelihood of such recidivism is extremely unpredictable at this juncture.[16] Yet the question remains: Is there a limit to the right to bail, or is it an absolute right? Whose rights take precedence, those of Mr. Underwood or those of society? What type of balancing takes place when alternative constitutional rights are weighed? And, finally, are there any satisfactory alternatives to the present system?

## Historical Origin

Article I, section 6 of the California Constitution is typical of many states' constitutions. As the supreme court correctly observed in *Underwood*, this provision contains not only the federal constitutional guarantee against excessive bail but includes some additional protection as well. By the time of California's Constitutional Convention in

10. 9 Cal. 3d at 349-50, 508 P.2d at 724, 107 Cal. Rptr. at 404 (emphasis in original).

11. 9 Cal. 3d at 350 & n.8, 508 P.2d at 724 & n.8, 107 Cal. Rptr. at 404 & n.8. *See generally* CAL. WELF. & INST'NS CODE §§ 5000-5344 (West 1972).

12. See text accompanying note 119 *infra*.

13. 105 Cal. App. 2d 215, 220, 233 P.2d 159, 162 (1951), *quoted in In re* Underwood, 9 Cal. 3d at 350, 508 P.2d at 724, 107 Cal. Rptr. at 404.

14. 9 Cal. 3d at 350-51 n.8, 508 P.2d at 724 n.8, 107 Cal. Rptr. at 404 n.8.

15. 9 Cal. 3d at 352 n.1, 508 P.2d at 726 n.1, 107 Cal. Rptr. at 406 n.1.

16. See note 105 *infra*.

1849, numerous states already had the same or substantially the same provision.[17] Therefore, by the time California was to consider it, bail as a matter of right in noncapital cases was already a recognized doctrine.[18]

17. The following states, with dates closest to the time of the California Convention, had substantially the same provision: Alabama (1819), Arkansas (1836), Connecticut (1818), Delaware (1831), Florida (1838), Illinois (1818), Indiana (1816), Iowa (1846), Kentucky (1799, 1850), Louisiana (1845), Maine (1819), Michigan (1835), Mississippi (1832), Missouri (1820), New Jersey (1844), North Carolina (1776), Ohio (1802), Pennsylvania (1776, 1838), Rhode Island (1842), Tennessee (1834), Texas (1845), Wisconsin (1848). Thus at the time of the California Constitutional Convention of 1849, 22 states had an identical or very similar provision, and only 6 had something different. Of these 6, 4 had provisions similar to the federal Constitution and 2 had no provision at all. *See generally*, 1-7 F. Thorpe, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS AND OTHER ORGANIC LAWS (1909) [hereinafter cited as THORPE].

18. By the ancient common law (circa the Norman conquest of 1066) all felonies in England were bailable, but the sheriff had broad discretion in granting or denying bail. Even though murder was made the first statutory exception in the twelfth century, the law was still very uncertain and sheriffs frequently abused their discretionary powers. Although the only prescribed *statutory* exception was for murder, sheriffs denied bail in other cases where they felt bail ought to be refused, and granted bail when it should have been denied. 4 W. BLACKSTONE, COMMENTARIES *298. Later statutes altered the power of the judiciary to grant or deny bail. *See, e.g.*, 11 & 12 Vict., c. 42, § 23 (1848); 7 Geo. IV, c. 64 (1826); 1 & 2 Phil. & M., c. 13 (1554); 23 Hen. VI, c. 9 (1444); 3 Edw. I, c. 15 (1275). Thereafter, in some cases no justice *could* bail. 4 W. BLACKSTONE, COMMENTARIES *298. For certain other offenses the English judges had *discretion* and for a third group of offenses the accused had to be bailed upon offering sufficient sureties. *Id.* at *299. As a final protection for the accused, King's Bench, the highest court of England, had the complete discretionary power to grant bail for any crime whatsoever. *Id.*

At the time the American colonies were drawing up their charters they were thus faced with divergent theories and some confusion. Admission to bail was discretionary for the justices of the King's Bench, but was nondiscretionary in most situations for the English justices of the peace. The Massachusetts colony in 1641 was the first to provide that: "It is ordered, and by this Court [legislative body] declared; that no mans person shall be restreined or imprisoned by any authoritie whatsoever before the Law hath sentenced him thereto: if he can put in sufficient securitie, *Bayle* or *Mainprize* for his appearance, and good behaviour in the mean time: unless it be in crimes Capital, and contempt in open Court, and in such cases where some expresse Act of Court doth allow it." THE LAWS AND LIBERTIES OF MASSACHUSETTS 28 (1648). New Jersey and Pennsylvania in 1682 opted to follow the example set by Massachusetts by providing "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great. . . ." LEAMING & SPICER, GRANTS AND CONCESSIONS OF NEW JERSEY, 1664-1702, at 235 (1881); FRAME OF GOVERNMENT OF PENNSYLVANIA—1682, *reprinted in* 5 THORPE, *supra* note 17, at 3061.

In 1787 the Northwest Ordinance, Act of Aug. 7, 1787, ch. 8, 1 Stat. 52n(a) (1787), guaranteed an absolute right to bail in noncapital cases with a provision almost identical to that of Pennsylvania and New Jersey set forth over 100 years before. Hence by the time of the first Congress, the American trend towards a fixed absolute right of bail was already well advanced. Notwithstanding that the federal Constitution did not contain the same provision, but merely prohibited excessive bonds, the Judiciary

There was very little debate regarding the provision at the convention itself. During the first discussion of the bill of rights, the excessive bail provision was adopted.[19] Later, on September 28, 1849, a delegate proposed the current section and it was accepted with only minor debate.[20] The proposing delegate's comments are instructive on the provision's meaning:

> It has been thought by some that the section which we have just adopted [excessive bail clause] covers this entire ground; but in my opinion it does not. This section is a part of the common law, and as we have not adopted the common law, and perhaps may not, I think it very necessary that such a section should be introduced, *so that in all cases, except capital offenses*, where the proof is evident or the presumption great, the party accused shall be entitled to bail. An innocent man may be kept in prison and refused bail, without such a provision as this.[21]

Of course California did accept the common law but the concern expressed above in requesting that the constitution expressly state that *all* offenses shall be bailable, except for capital offenses, echoed the concern of those in the early colonies. These early colonies were agitated about the infringement of their rights by England and were leery of any such infringements by their own government. Thus, one of the main objects in drafting the early state constitutions was to limit government's power, especially in the area of individual rights. The power of the government, through the courts, to deny an individual bail and thereby imprison him without trial could clearly be a severe governmental infringement on the rights of its citizens. Specific limitations on this discretionary power of the courts were thus promulgated to insure protection of the right to bail.

A further indication of the restrictions to be placed on the courts, and one which showed the resolve of the people of California, concerned the latter clause of article I, section 6: "when the proof is evident or the presumption great." The delegates at the convention, in voting against a proposed deletion of this clause,[22] thought that permitting a denial of bail in *all* capital cases could lead to a great injustice—*i.e.*, detaining a person arrested for a capital offense even though

Act of 1789, ch. 20, § 33, 1 Stat. 91, did provide for nondiscretionary bail as did an increasing number of state constitutional provisions. Pennsylvania and North Carolina included the provision in their constitutions even prior to the adoption of the federal Constitution. PA. CONST. § 28 (1776), *reprinted in* 5 THORPE, *supra* note 17, at 3089; N.C. CONST. art. XXXIX (1776), *reprinted in* 5 THORPE, *supra* note 17, at 2793.

Thus, while the federal Constitution did not patently prescribe the right to bail in noncapital cases, the states continued to provide for it explicitly.

19. J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 41 (1850).

20. *Id.* at 293.

21. *Id.* (emphasis added).

22. *Id.*

the evidence against him was insufficient. In 1879 when the constitution was finally adopted the provision was left intact.

It is also instructive to examine judicial construction of article I, section 6 shortly after it was enacted. Such interpretations of constitutional provisions near the time of their adoption are generally held to be strong evidence of their true meaning.[23] In *Ex parte Duncan*,[24] an 1879 case, the court held that the right of a prisoner to be admitted to bail upon several noncapital indictments was guaranteed by the express words of the constitution. *People v. Tinder*[25] (1862) and *Ex parte Ruef*[26] (1908) also reached the result that admission to bail in noncapital cases is a right of the accused which no court can lawfully refuse.

Unreasonable restrictions and arbitrariness in granting or denying bail were typical examples of the invasions of personal liberty by the British Crown which the American colonists found intolerable to the point of revolution. It is not surprising, therefore, that in drafting their bail provisions, the states were careful to guard against such abuses in the future. In light of this history, each state's constitutional provisions ought to be accorded reasonably liberal interpretation, in harmony with both the language and the evident purpose and policy of the provision:

> [Bail gives] full fealty to the basic principles of freedom, inherent in our system, that an accused is presumed to be innocent until his guilt is established . . . beyond a reasonable doubt, it reconciles a sound administration of justice with the rights of the accused to be free from harassment and confinement, unhampered in the preparation of his defense and not subjected to punishment prior to conviction.[27]

At the time of the adoption of the California Constitution, the constitutions of twenty-two other states contained basically the same provision as California was considering.[28] Since that time seventeen more have included a nondiscretionary bail provision in their constitutions.[29] Thus, only ten states do not have bail as a matter of right

23. Knowles v. Yates, 31 Cal. 83, 89 (1866).

24. 54 Cal. 75 (1879).

25. 19 Cal. 539, 542 (1862).

26. 8 Cal. App. 468, 469, 97 P. 89, 90 (1908). *See also In re* Westcott, 93 Cal. App. 575, 576, 270 P. 247, 248 (1928).

27. Dudley v. United States, 242 F.2d 656 (5th Cir. 1957).

28. See note 17 *supra*.

29. Ariz. (1912) art. II, § 22; Colo. (1876) art. II, § 19; Ida. (1889) art. I, § 6; Kan. (1858) art. I, § 9; Minn. (1857) art. I, § 7; Mont. (1889) art. III, § 19; Neb. (1866-67) art. I, § 9; Nev. (1864) art. I, § 7; N.M. (1912) art. II, § 13; N.D. (1889) art. I, § 6; Okla. (1907) art. II, § 8; Ore. (1857) art. I, § 14; S.C. (1868) art. I, § 20; S.D. (1889) art. 6, § 8; Utah (1895) art. I, § 8; Wash. (1889) art. I, § 20; Wyo. (1889) art. I, § 14.

in noncapital cases as a constitutional guarantee. Of these, four provide for the right by statute,[30] two have no provision[31] and the other four have an excessive bail provision similar to the one in the federal Constitution.[32] In addition, while the federal government guarantee of right to bail under the Eighth Amendment is still hotly debated, at least some of the pressure was relieved by passage of the Bail Reform Act of 1966[33] which also provided for bail as a statutory matter of right in all noncapital federal cases.

In Arizona, which has the same bail provision as California, but with one additional exception,[34] an appellate court held that the bail provision was mandatory, not merely directory and hence discretionary.[35] Colorado with an identical provision[36] also held that the provision was mandatory.[37] While the court may entertain testimony as to the circumstances surrounding the felonious charge for the purpose of determining the *amount* of bail, the right to bail cannot be denied except in capital crimes.

Nor do any of the states having provisions like California's allow for denial of bail because the accused may pose as a threat to the public safety. As will be illustrated, such an exception is contrary to the basic purpose of bail and to the constitutional provision. Historically, in all these states, the right of the individual to bail before trial is a fundamental one. The Wyoming Supreme Court in *State v. Crocker*[38] stated the purpose as follows:

> It must be borne in mind that our laws are intended to be framed upon the humane idea that no man is to be punished until he has been convicted; that an accused is only confined in jail before trial and conviction to secure his presence at the trial, and, if convicted, that he may be compelled to undergo sentence; that, however, if by sureties his presence can as well be secured, it is deemed wise and just that he shall, until trial and conviction, be allowed his lib-

30. ALASKA STAT. § 12.30.010 (1970); HAWAII REV. STAT. §§ 709-3, 4 (shall be bailable . . . unless for offenses punishable by imprisonment for life not subject to parole . . . .); MD. ANN. CODE RULES OF PROC. 777 § a (1971); N.H. REV. STAT. ANN. ch. 597:1 (Supp. 1972).

31. No provision: Georgia and Vermont.

32. Excessive bail provision: MASS. CONST. art. XXVI; N.Y. CONST. art. I, § 5 (however, N.Y. CRIM. PROC. LAW §§ 530.20, 510.30 (McKinney 1971) provides for limited discretion); VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5.

33. 18 U.S.C. §§ 3146-52 (1970).

34. ARIZ. CONST. art. 2, § 22 (as amended Nov. 3, 1970); *see* note 119 *infra*.

35. State v. Garrett, 16 Ariz. App. 427, 493 P.2d 1232 (1972).

36. COLO. CONST. art. II, § 19.

37. Palmer v. District Court, 156 Colo. 284, 398 P.2d 435 (1965). The court in *Palmer* said, "The mention of the one exception [capital offenses] excludes other exceptions. Courts would violate their mandate if they were to add another to the exception expressed in the . . . provision." *Id.* at 287, 398 P.2d at 437.

38. 5 Wyo. 385, 40 P. 681 (1895).

> erty, except in capital offenses, where the proof is evident or the presumption great, in which cases it is deemed that the offense is so grave it is not safe to allow the presence of the accused to be secured by bail.[39]

Therefore it is not unreasonable to accept the proposition that if so many states have this same constitutional bail provision, which derives from the very origins of civil government in this country, that provision should be regarded as serving a fundamental and commonly recognized philosophy and function. The function is obvious: to assure that the defendant will not flee the jurisdiction. As Bishop stated it:

> [The danger of escape] is the only just ground for denying bail to one accused of any crime, yet not convicted. But something of such danger exists in every case, and it increases with the severity of the punishment and the probability of a conviction. Always, therefore, these two elements should, in combination, be taken into the account on the questions of accepting bail and the amount. And where the probabilities of flight are overwhelming, there should be no bail. Thus, [a capital crime,] with guilt and conviction certain, is of this sort; for, in the language of Scripture, "all that a man hath will he give for his life."[40]

If the purpose of bail is solely to assure the presence of accused at trial[41] then all other reasons for denying it come in direct conflict with the constitutional guarantee. The early colonies realized what a morass the administration of bail had become: discretionary in some cases by some judges, that discretion oftentimes abused, the purpose of it somewhat obscured by improper application. Thus, when it came time to draft bail provisions for the state constitutions the drafters wanted to define the right explicitly, maximizing the individual's right and minimizing the possibility of legislative and judicial encroachment of that right. Indeed, it is very significant that these early constitutions did not limit the bail provisions to the coverage provided for by the federal Constitution—that of the excessive bail clause.[42]

Thus, in the overwhelming majority of the thirty-nine states which provide for the constitutional right to bail (including California after *In re Underwood*) the legal effect is definite and well settled: all offenses are bailable as a matter of right, except those which are considered

39. *Id.* at 391, 40 P. at 687.

40. 1 J. BISHOP, NEW CRIMINAL PROCEDURE § 255, at 154-55 (4th ed. 1895).

41. *In re* Petersen, 51 Cal. 2d 177, 181, 331 P.2d 24, 27 (1958). *See also* McDermott v. Superior Court, 6 Cal. 3d 693, 695, 493 P.2d 1161, 1163, 100 Cal. Rptr. 297, 299 (1972) (no suggestion of revenue to the government nor of punishment to the surety in granting bail); *accord,* Sawyer v. Barbour, 142 Cal. App. 2d 827, 833, 300 P.2d 187, 190 (1956).

42. *See generally* Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959 (1965).

"capital"; and even those so considered are bailable unless the proof is evident or the presumption great.[43]

### Implications of the Decision—Parameters of the Right

In light of the foregoing discussion, the question becomes: Is bail in noncapital cases an absolute right, or, if not, are there any constitutionally acceptable limitations on the right?

At the outset it is universally recognized that no right, no matter how guaranteed or by how high an authority, is absolute. Since all rights may be subject to abuse there must be some provisions to anticipate the abuses. Often this problem is solved by a balancing of possible conflicting rights and recognizing that certain ones may take precedence over others.[44] Likewise rights and privileges may be waived. For example, one may waive the Fifth Amendment privilege by testifying against his best interests. Similarly, the right to bail may be

43. People v. Tinder, 19 Cal. 539 (1862). Significantly, this right is included in most state constitutions in the portion denominated the "Bill of Rights." These sections were the repository of those rights most cherished and zealously guarded by the delegates of the various state constitutional conventions.

44. Provisions of the state's constitution are mandatory and prohibitory unless expressly declared to be otherwise. CAL. CONST. art. I, § 22; *see* Jenkins v. Knight, 46 Cal. 2d 220, 224, 293 P.2d 6, 8 (1956). This rule applies, however, to all sections of the constitution alike and to everyone subject to the mandate of the constitution. Santa Clara County v. Superior Court, 33 Cal. 2d 552, 554, 203 P.2d 1, 2 (1949). A problem may arise when two sections of the constitution appear to be in conflict. For instance, article I, section 6, says "[a]ll persons shall be bailable . . . unless for capital offenses . . ." but article I, section 1, recognizes that "[a]ll people . . . have certain inalienable rights, among which are . . . *obtaining* safety, happiness, and privacy" (emphasis added).

Although there could be an apparent conflict between the right of an accused to be released on bail and the right of another to obtain safety and happiness, the conflict is resolved. Where the language used in a constitutional provision plainly and unequivocally shows a definite and certain purpose to be accomplished, courts must construe it so as to carry that purpose into effect. Boca Mill Co. v. Curry, 154 Cal. 326, 338, 97 P. 1117, 1123 (1908). Clearly article I, section 6, provides that all persons shall be bailable for noncapital offenses upon sufficient sureties. The terms and conditions are neither vague nor ambiguous, whereas article I, section 1, is open to broader interpretation. It is universally held that when constitutional provisions cannot reasonably be construed to avoid a conflict, the constitutional provision which is more specific prevails. Serrano v. Priest, 5 Cal. 3d 584, 596, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).

Assuming, arguendo, that there is a conflict between the two provisions, article I, section 6 bail provision is very specific and article I, section 1 purposely left unspecific, so the bail provision must prevail. However, it is submitted that the bail provision does not stand in conflict with the article I, section 1 guarantees, but rather fulfills part of its promise—that we will remain free from government oppression. If it were a matter of the state's discretion to detain people without bail, then everyone *could* be faced with unreasonable or arbitrary arrest and detention.

waived by the person submitting to incarceration rather than posting bond.

Accepting the proposition that the right to bail may be qualified under appropriate circumstances, one must then inquire as to what those circumstances are. In *In re Underwood*, the court was forced to confront the constitutionality of one such qualification that had begun to creep into some decisions—that bail is a matter of right in all noncapital cases *except where for the safety of the individual or for the protection of society it would be proper to deny bail.*[45] This rather striking exception to mandatory release on bail must be scrutinized.

The first case to depart from the traditional interpretation was *In re Henley*.[46] There, the defendant was arrested on a warrant stating that he was "so far addicted to the intemperate use of stimulants as to have lost the power of self-control,"[47] and that because of such condition he should be committed to a state hospital. The court, although holding that the petitioner should be admitted to bail pending an examination, stated that "there might be some instances where for the safety of the individual or of society it would be proper to deny bail, but unless such a showing is made, the [constitutional prohibition] should be held to apply."[48] The court observed that the instances could only exist under the statute and they could not be in conflict with the constitutional guarantees. From this bit of dictum, the case was subsequently cited for the proposition that a public safety exception to bail exists. However, analysis reveals that the essence of the holding was concerned with a *civil commitment* situation.

*In re Westcott*,[49] while quoting *In re Henley* as saying that there may be some situtations where the defendant could be detained, held otherwise. There, defendant was twice convicted of murder but both convictions were reversed on appeal. The second reversal was due to insufficiency of the evidence, and therefore within coverage of the bail provision. Prior to the third trial the court ruled that he *was* entitled to have bail fixed and to be released because there was nothing to indicate that additional evidence would be produced by the prosecution. Furthermore, one's right to bail is not affected by the fact that he may be insane.[50] *In re Gentry*[51] also quoted *In re Henley*, but again the

45. *See, e.g.*, Bean v. County of Los Angeles, 252 Cal. App. 2d 754, 60 Cal. Rptr. 804 (1967).

46. 18 Cal. App. 1, 121 P. 933 (1912).

47. *Id.* at 2, 121 P. at 934.

48. *Id.* at 5, 121 P. at 935 (dictum).

49. 93 Cal. App. 575, 270 P. 247 (1928).

50. *In re Westcott* was also concerned with the questionable sanity of the accused and thus he might have been detained by use of the civil commitment provisions, if a sufficient showing of his insanity had been made. *Id.* at 576-77, 270 P. at 248 (dictum).

51. 206 Cal. App. 2d 723, 24 Cal. Rptr. 208 (1962).

holding was not based on the principle enunciated in *Henley*. The *Gentry* court held that the right to bail pending trial is not lost by the entry of a plea of not guilty by reason of insanity.

*Evans v. Municipal Court*[52] was a case concerning an inebriate. The court in citing *Henley, Gentry* and *Westcott* said that "[i]t has been *suggested* that either for the safety of the individual or for the protection of society, it *may* be proper in some instances to deny bail."[53] The court went on to hold that the appellant's "condition of *inebriation* allowed the officer discretion in refusing to release appellant immediately on bail if . . . to do so would endanger the appellant or society."[54] In that case the detaining official did not act unreasonably if he released defendant as soon as it reasonably appeared that he was no longer under the influence of intoxicating liquor.[55]

In specifically overruling these cases insofar as they created a public safety exception to the right to bail, the court in *Underwood* explicitly rejected the notion that the right to bail could be qualified by a potential threat to society. Thus implicit, if not explicit, in the decision is the recognition that bail *is* an absolute right prior to trial for noncapital offenses with but one limitation. That limitation—risk of flight—is so inextricably woven into the concept of bail that without it, bail would be meaningless. The right to bail means that the accused has the right to pretrial liberty on such bond in such amount as in the judgment of the trial court will insure his appearance at the trial. If, however, the court is satisfied from the evidence presented on the application for bail that regardless of the amount of bail fixed, the accused, if released, will probably flee to avoid trial, bail may be denied.[56]

There is one other limitation on the right which, although *Underwood* would seemingly exclude it, could have enough justification that it would not be inconsistent with proscription of the "public safety" exception. That limitation would occur when the accused engages in intimidating and threatening conduct in trying to prevent witnesses from testifying against him. The distinction here lies in the public policy served. The power to protect witnesses is necessary to prevent the disruption of the judicial process that might be occa-

52. 207 Cal. App. 2d 633, 24 Cal. Rptr. 633 (1962).

53. *Id.* at 636, 24 Cal. Rptr. at 635 (emphasis added).

54. *Id.* (emphasis added).

55. It should be noted that the suggestion of an exception in these cases appears somewhat unnecessary. That is, all of the cases could have had a valid constitutional solution if they had been based on the civil commitment of the defendant, rather than on a newly created exception to the constitutional right to bail.

56. State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972); Cohen v. United States, 82 S. Ct. 8 (1961) (Douglas, Circuit J.); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972).

sioned if witnesses, as a result of threats and intimidation, refused to appear at trials. Thus, this qualification is actually based on the inherent power of the court to manage the conduct of a trial and to insure the fair administration of justice.[57]

### Capital v. Noncapital Offenses: Elimination of Death Penalty

The bail provision does not stand for the proposition that bail is a matter of right for "capital offenses when the proof is evident or the presumption great."[58] Traditionally, bail is discretionary for pretrial release in capital cases of this nature.[59] However, two questions are raised: What constitutes a capital offense, and what happens if the death penalty is eliminated? If the only legitimate purpose for denying bail in capital cases is the great risk of flight by the accused when his alternative is possible death, then if he no longer faces that alternative, the reason for the denial of bail exception is vitiated. Whatever the intended reason for the clause, the language itself must still be analyzed, especially in light of the modern trend away from the death penalty.

The primary inquiry is to ascertain what is meant by a capital offense. A Kansas court which allowed bail in a "capital" case, after that state by statute reduced the death penalty to life imprisonment, stated:

> In all [the state] constitutions the word "capital" had a definite, settled meaning, which was the meaning accorded the word in general usage whenever employed as an adjective qualifying the terms crime, offense, or felony—punishable by deprivation of life. Doctor Johnson's definition is a sentence from Bacon, "That which affects life."[60]

57. *See, e.g.*, United States v. Gilbert, 425 F.2d 49 (D.C. Cir. 1969); Sica v. United States, 82 S. Ct. 669 (1962) (Douglas, Circuit J.) (defendant admitted to bail despite his record for violence and his alleged threatening conduct toward witnesses; showing of necessity to protect witnesses not sufficient); Carbo v. United States, 82 S. Ct. 662 (1962) (Douglas, Circuit J.) (defendant denied bail as strong evidence shown he had threatened witnesses and in prior trial one key witness died and another disappeared); Fernandez v. United States, 81 S. Ct. 642 (1961) (Harlan, Circuit J.); FED. R. CRIM. P. 46(b), *as amended*, (Supp. 1973). California may have provided for this situation by CAL. CONST. art. I, § 6 which states, "Witnesses shall not be unreasonably detained . . . ." Although this appears to be a provision to prevent the court from detaining witnesses against their will, it could arguably be used to show that because of the serious threats posed by accused against the witnesses it had the same effect as unreasonably detaining them, especially if it is necessary to have them put into protective custody.

58. CAL. CONST. art. I, § 6; *In re* Troia, 64 Cal. 152, 28 P. 231 (1883); *In re* Page, 82 Cal. App. 576, 578, 255 P. 887, 888 (1927).

59. People v. Tinder, 19 Cal. 539 (1862); *cf. Ex parte* Wolff, 57 Cal. 94 (1880) (defendant charged with abortion killing; no intent to kill and therefore not first degree murder; hence no death penalty and offense bailable as a matter of right).

60. *In re* Ball, 106 Kan. 536, 538, 188 P. 424, 425 (1920).

It was not a matter of whether the death penalty *had* to be rendered, but rather whether it was a *possible* sentence. An Alabama court, in considering the problem said that "[t]he question . . . was not whether the accused must necessarily be punished with death,—because this [the magistrates] could not know until after the trial,—but whether he *might* be so punished, and probably would be under the proof."[61] If the jury has the power of saying, in cases of murder in the first degree, whether the accused shall suffer death or go to the penitentiary for life, then capital punishment still remains, and bail may still be denied. But if the punishment may no longer be death then a different situation arises.

There appear to be two different courses taken by the states as they eliminate the death penalty either by legislative enactment or judicial decision.[62] The Connecticut Supreme Court in 1972 held that even though the accused was held on three counts of murder, if he gave sufficient surety for his later court appearance, he was entitled to bail and release as he was not being detained for an offense punishable by death.[63] The Arizona Supreme Court, basing its decision on the fact that the United States Supreme Court had struck down the death penalty,[64] said that the defendant charged with first degree murder must be released on bail.[65] Maryland was in accord with the foregoing, holding that while the trial court had discretion in setting the amount of bail for one accused of murder, the accused was still entitled to be admitted to bail before conviction as a matter of right.[66] An Ohio appellate court recently held that all defendants shall be allowed bail due to the *Furman* decision[67] even though the state constitution says "[a]ll persons shall be bailable . . . except for capital offenses,"[68] basing this holding on the fact that a capital offense is "one where death may be imposed."[69]

61. *Ex parte* McCrary, 22 Ala. 65, 71 (1853); *accord, In re* Berry, 198 Wash. 317, 88 P.2d 427 (1939).

62. Presently the death penalty has been totally abolished in the following states: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Jersey, North Dakota, Oregon, Vermont, West Virginia, Wisconsin; and with some exceptions in California, Georgia, New Mexico, New York and Rhode Island.

63. State v. Aillon, 295 A.2d 666 (1972); *accord*, State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972); State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); *In re* Perry, 19 Wisc. 711, 712 (1865) ("The court are of opinion that since the abolition of capital punishment in this state, persons charged with murder are in all cases bailable").

64. Furman v. Georgia, 408 U.S. 238 (1972).

65. *In re* Tarr, 109 Ariz. 264, 508 P.2d 728 (1973).

66. McLaughlin v. Warden of Baltimore City Jail, 16 Md. App. 451, 298 A.2d 201 (1973).

67. Edinger v. Metzger, 32 Ohio App. 2d 263, 290 N.E.2d 577 (1972).

68. OHIO CONST. art. I, § 9.

69. Edinger v. Metzger, 32 Ohio App. 2d 263, 264, 290 N.E.2d 577, 578 (1972).

Louisiana expressed the opposing view in *State v. Flood*,[70] holding that even after the Supreme Court decision, constitutional provisions concerning bail need not be changed. Thus, offenses classified as capital before that decision were still to be classified as capital offenses, and those charged with an offense punishable by death before *Furman* would not be entitled to bail, even though the death penalty itself was eliminated.[71]

Mississippi used a slightly different rationale to uphold denial of bail in a capital case. The supreme court of that state held that a capital case is any case where permissible punishment prescribed by the legislature is death even though such penalty may not be inflicted as a result of the Supreme Court's decision.[72] This is not exactly the opposite side, because the offense was still considered "capital" in Mississippi. This leads to the conclusion that if the death penalty were eliminated in Mississippi either by its legislature or by its courts, then the offense would probably be bailable.[73]

The California Supreme Court in *People v. Anderson*[74] struck down the death penalty as being cruel and unusual punishment in violation of the California Constitution. A petition for rehearing was filed on the question of whether bail should be denied as formerly in murder cases where guilt is evident or the presumption is great. By way of a footnote the court said the offense was still murder, even though the death penalty could no longer be exacted. The court therefore felt that, subject to future consideration, former capital offenses would

70. 263 La. 700, 269 So. 2d 212 (1972).

71. *Cf.* People *ex rel.* Dunbar v. District Court, 500 P.2d 358 (Colo. 1972) (Supreme Court decision prohibiting the death penalty did not preclude denial of bail to defendants charged with five counts of murder in the first degree by arson).

72. Hudson v. McAdory, 268 So. 2d 916 (Miss. 1972).

73. Compare what occurred in the state of Washington. In a case arising after the state had abolished the death penalty, the court said, "Since there is now no capital punishment in this state, there are no capital offenses . . . ." State v. Johnson, 83 Wash. 1, 3, 144 P. 944, 945 (1914). In a subsequent case, the court said, "The test to be applied in determining whether an offense is a capital one, within the meaning of the constitution or statute, is not whether the death penalty must necessarily be imposed, but whether it may be imposed." *In re* Berry, 198 Wash. 317, 319, 88 P.2d 427, 428 (1939). The two cases appear to be inconsistent, but they are not. Washington abolished capital punishment in 1913 and restored it in 1919.

Since death is still a possible penalty in Washington, that state's supreme court was justified in holding in a post-*Furman* case that under the Washington statute conferring right to bail pending appeal except in capital cases, judicial abolition of the death penalty did not entitle defendant to bail pending appeal from conviction for first degree murder. State v. Haga, 81 Wash. 2d 704, 504 P.2d 787 (1972). The court in *Haga* overruled *Johnson* to the extent it was inconsistent with *Haga* and agreed with the reasoning of *Berry*.

74. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

continue to be nonbailable "when the proof of guilt is evident or the presumption thereof great."[75] This is clearly distinguishable from the Mississippi case discussed above,[76] because in Mississippi the state through its legislative acts and constitutional provisions still prescribed the death penalty for certain crimes. The United States Supreme Court merely forbade the execution of such a penalty. Therefore, Mississippi's decision for continuing to deny bail is logical.

California's position, on the other hand, was not logically sound. Since the court ruled in *Anderson* that the death penalty in California was unconstitutional in all cases, then of course it was saying that the death penalty could no longer be imposed. If there is no possibility of death, then by the majority and better view there has been no "capital" offense committed. And if there has been no capital offense committed, then bail should be admitted as a matter of right.[77]

The issue is whether it is the offense which is precluded from the right to bail, or whether it is the possible penalty resulting from that offense that is to be used as the criterion for denying bail. It is submitted that it is the possibility of death as a punishment that is precluded from bail as a matter of right because it is under these circumstances that the risk of flight is so great.[78]

In further support of this reasoning it is a general maxim of constitutional interpretation that *exceptions* contained in constitutional provisions are to be narrowly construed.[79] If this is true, then the interpretation follows that only where death is a possible penalty is the exception to bail as a matter of right applicable.

Even assuming that the constitutional provision regarding "capital offenses" may be open to interpretation,[80] legislative enactments

75. *Id.* at 657 n.45, 493 P.2d at 899 n.45, 100 Cal. Rptr. at 177 n.45.

76. Hudson v. McAdory, 268 So. 2d 916 (Miss. 1972).

77. *See also, In re* Boyle, 113 Cal. Rptr. 99 (1974).

78. The court applying New Jersey law in United States *ex rel.* Merritt v. Vukcevich, 339 F. Supp. 779 (N.J. 1972) perceived the distinction. In that case the defendant's conviction for first degree murder and the court's imposition of a life sentence had been set aside thus precluding the imposition of the death penalty on retrial. Therefore the court reasoned that the defendant was entitled to release on bail pending retrial (under New Jersey law prior to trial on charge for which the death penalty may be imposed, bail may be denied; but where death may not be imposed, bail was a matter of right). The point is that if death is no longer a possible penalty, then the crime is no longer capital and does not come within the exception of the constitutional guarantee to bail. *See also* People v. Superior Court, 35 Cal. App. 3d 219, 110 Cal. Rptr. 581 (1973).

79. Corey v. Knight, 150 Cal. App. 2d 671, 680, 310 P.2d 673, 679 (1957).

80. It apparently had been so interpreted in California in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). Recently, the court in *In re* Boyle, 113 Cal. Rptr. 99 (1974), reconsidered the *People v. Anderson* footnote, and held that when the defendant's acts are no longer included within the legislatively denominated "capital offenses" he is entitled to bail even though the offense when committed

thereunder are also relevant; and to the extent that they are not inconsistent with constitutional provisions, they are upheld. Thus the California statutory provision passed in 1872 regarding bail is typical: "A defendant charged with an offense *punishable with death*[81] cannot be admitted to bail, when the proof of his guilt is evident and the presumption thereof great . . . ."[82] Another section provides, "If the charge is for *any other offense*, he may be admitted to bail before conviction, as a matter of right."[83] It is felt that the majority in *In re Underwood* was incorrect in adding "capital" into its reading of the second statute; *i.e.* "If the charge is for any other (*than a capital*) offense . . . ."[84] It would be more appropriate to add "If the charges are for any other offense (other than *one punishable by death*), he may . . . ."

The statute[85] clearly limits its coverage to offenses "punishable by death" and whatever can be read into "capital offenses" cannot be read into "punishable by death." Therefore if the state eliminates the death penalty it eliminates offenses punishable by death, and that statutory provision[86] has no real meaning and becomes moot. The conclusion then follows that the accused also is entitled to bail by statutory provision as a matter of right before conviction *if* the death penalty is eliminated.[87]

One final point should be discussed to show that continuing to treat "capital" offenses as capital offenses after the death penalty has been abolished is unsound and contrary to history. Over the years we have gradually abolished the death penalty for various offenses. For example, withcraft, adultery, idolatry, blasphemy, and even being a

would have been so considered. The court specifically did not resolve the question of the constitutionality of the death penalty. It would appear, however, that if the death penalty were struck down as unconstitutional, then there would be no capital offenses and based on the reasoning of *In re Boyle* the court would be constitutionally compelled to hold that all criminal offenses would be bailable.

81. In *In re* Scaggs, 47 Cal. 2d 416, 303 P.2d 1009 (1956), the court held that before conviction, a defendant charged with a felony *not punishable with death* is entitled to be admitted to bail as a matter of right.

82. CAL. PEN. CODE § 1270 (West 1970) (emphasis added).

83. *Id.* § 1271 (West 1970) (emphasis added).

84. *In re* Underwood, 9 Cal. 3d 345, 346, 508 P.2d 721, 722, 107 Cal. Rptr. 401, 402 (1973).

85. CAL. PEN. CODE § 1270 (West 1970).

86. *Id.*

87. The status of death as a possible penalty is in a state of flux in California. CAL. CONST. art. I, § 27 (added Nov. 7, 1972) clearly provides that the death penalty shall not be deemed to constitute "cruel or unusual punishment within the meaning of Article I, Section 6 . . . ." In an attempt to circumvent the argument of arbitrariness, CAL. PEN. CODE §§ 190, 190.2 (West Supp. 1974) makes the death penalty mandatory in specific situations. Whether this attempt to reinstate the death penalty in California will withstand judicial scrutiny is, at this time, uncertain.

"stubborn or rebellious son [over sixteen] which [sic] will not obey the voice of his father"[88] were, at one time, punishable by death. Because these offenses were once capital, are they still to be treated as capital after death as a punishment has been removed? Obviously not, and courts have so held. Given the policy underlying this decision, it is difficult to understand why removal of the death penalty from even murder should require any different result.

## Present Alternatives

Although *In re Underwood* clearly denies the constitutionality of a public safety exception to the right to pretrial bail, it does not solve the basic problem of how society may effectively protect itself against potentially dangerous persons. Excluding the public safety exception, there appear to be three primary alternatives for dealing with such persons: high bail, preventive detention, and civil commitment. While each of these methods does serve the function of keeping the criminal separated from society at large, each also contains some serious limitations that prevent it from being a truly effective solution to the problem. In order to understand why it is imperative that another method of dealing with potential recidivists be found, it will be necessary to examine first the limitations in those alternatives already proposed.

### "Sufficent Sureties": High Money Bail

While it is improper and in excess of a California state court's jurisdiction to deny bail, either to punish or to preventively detain the accused, or due to the gravity of his alleged offense, or due to the alleged criminality of the accused,[89] it is apparently proper to use some of these factors in setting the amount of bail.

Generally it has been held that the character and past record of the accused, the seriousness of and number of crimes for which he is charged and the penalties attached thereto, and the probability of his appearance at the trial or hearing of the case may be considered in fixing the amount of bail.[90]

There is however, an inconsistency in the way the analysis of the criteria is used. *In re Newbern*[91] indicates this inconsistency. There, the court said, "The *only* permissible purpose of . . . bail . . . is

88. Some 200 other offenses were, at one time, punishable by death in England and 14 others in Massachusetts in 1648; THE LAWS AND LIBERTIES OF MASSACHUSETTS 5 (1648).

89. *In re* Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951).

90. Bland v. Holden, 21 Ohio St. 2d 238, 257 N.E.2d 397 (1970); *In re* Newbern, 55 Cal. 2d 500, 360 P.2d 43, 11 Cal. Rptr. 547 (1961); *In re* Brumback, 46 Cal. 2d 810, 299 P.2d 217 (1956); CAL. PEN. CODE § 1275 (West 1970).

91. 55 Cal. 2d 500, 360 P.2d 43, 11 Cal. Rptr. 547 (1961).

practical assurance that defendant will attend [trial]."[92] Later, the same opinion noted that "the magistrate charged with setting the bail is to consider 'the seriousness of the offense charged, the previous criminal record of the defendant, *and the probability of his appearing at the trial or hearing of the case.*' "[93]

If the sole purpose of bail is to assure attendance of defendant at trial then the other two factors may be relevant to determine if he will flee, but they alone should not be used to detain the accused by setting high bail where the circumstances indicate no real risk of flight. It seems that on the one hand we give a right to bail and eliminate discretion from impinging on that right, and then on the other hand we emasculate the right by giving broad discretion to the judge in setting the amount of bail. Clearly, this amount of discretion may result in a subterfuge of the real purpose of bail since realistically judges may be prone to be subjective in setting the amount of bail. Indeed the "public safety" is the reason most often given for increasing the amount of bail to the point where the defendant cannot produce it and is therefore detained.[94] According to a survey conducted by a noted authority in the field, if the amount of bail is placed at or above $5,000 some 87 percent of the defendants would be unable to produce bail.[95] Thus the whole right to bail would basically be subverted if the judges would or could set bail at $5,000 for each defendant.

Hence, while the stated reason for setting high bail is to prevent a defendant from fleeing, the *subrosa* and oftentimes not so *subrosa* reason is to protect the "public safety." As we have seen, the "public safety" exception to bail as a matter of right is unconstitutional.[96] In short, high bail is not justified simply because the defendant's character is "bad"; there is no presumption from this alone that he is apt to flee.[97]

Even if the reasons for setting bail were scrupulously adhered to, high bail may come under constitutional attack for a number of other reasons. Although it is generally held that the ability to pay is not to be a factor in the setting of bail,[98] the United States Supreme Court may

92. *Id.* at 504, 360 P.2d at 45, 11 Cal. Rptr. at 549 (emphasis added).

93. *Id.* (emphasis added).

94. *See* Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031 (1954).

95. *Id.* at 1033. Even if it is set as low as $500 up to 1/3 of the defendants may be unable to post bail. It should be noted, however, that these figures are 20 years old and do not reflect current inflation.

96. *In re* Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

97. Hairston v. United States, 343 F.2d 313, 314-15 (D.C. Cir. 1965) (dissenting opinion). *See also* Palmer v. District Court, 156 Colo. 284, 398 P.2d 435 (1965); Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85 (1959).

98. White v. United States, 330 F.2d 811 (8th Cir. 1964); Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963); *Ex parte* Paul, 36 Okla. Crim. 86, 252 P. 853 (1927).

have portended eventual elimination of that idea. In *Griffin v. Illinois*[99] the Court ruled that indigents must be afforded as adequate an appellate review as defendants who have enough money to buy trial transcripts, stating, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[100] The "kind of trial a man gets" is directly related to his ability to prepare his defense, and this is directly related to his being at liberty to find possible witnesses, assist his attorney in ascertaining the facts, etc.[101] Therefore it is not unreasonable to deduce that an indigent should have the same right to pretrial release as the wealthy have.

In reality, under the present system he does not. If Professor Foote is correct in his figures, then even so much as $500 bail has an enormous impact on whether a poor man may be released on bail, while obviously it does not have the same effect on the wealthy. Indeed, the professional hired gun, the racketeer and others who present the greatest danger to society inevitably are able to post bond, while the monetarily less fortunate languish in jail and consequently have a much higher rate of conviction.[102] In addition, money bail also has other very serious effects on the indigent: although he is the least able to shoulder the burden of loss, he typically suffers temporary disruption or permanent loss of employment, family relationships and other ties to the community. This is especially unjust and unrealistic in furthering the goals of the judicial function of government when there are less restrictive and equally effective alternatives.

The burden on the individual is clear. The burden on society, while more difficult to perceive, is nevertheless significant. Frequently, those individuals who have been unable to post bond, and have subsequently lost their jobs, become an even greater burden on society when they are released. They join the roles of the unemployed and have a better chance of entering (or returning to) a life of crime.

**Preventive Detention**

Certainly the most widely discussed alternative to bail as matter of right is preventive detention. While the subject of preventive detention is extensively documented, it is also highly susceptible to subjective reasoning and emotional response. In short, the factual determinations regarding the effectiveness of preventive detention are at best insufficient and at worst misleading. Depending on what view a par-

99. 351 U.S. 12 (1956).

100. *Id.* at 19.

101. *See generally* Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631 (1964).

102. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 642-43 (1964).

ticular author subscribes to, the figures on preventive detention seem flexible enough to prove his or her point.[103]

It is beyond the scope of this note to engage in a lengthy discus-

103. For example, one senator, who is evidently a proponent of preventive detention where there is a threat to the public safety, pointed out that NATIONAL BUREAU OF STANDARDS, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRETRIAL RELEASE OF DEFENDANTS: A PILOT STUDY 535 (1970) indicated "that 25 percent of persons charged with dangerous crimes and 17 percent of those charged with violent crimes can be expected to be rearrested for further crime while on pretrial release. These figures must be further adjusted to reflect the fact that many crimes are not reported to the police, and that only 30 percent of reported crimes, even, result in arrest and criminal charges." 116 CONG. REC. 24893 (1970) (remarks of Senator Tydings). This senator is using the figures to show that they are high enough to indicate that "crime committed by persons on court-ordered release, or bail recidivism, is of large enough proportion to be considered of major consequence to law enforcement." *Id. See also* Younger, *It's Time to Forfeit Bail*, 5 SW. L. REV. 262 (1973). Younger recognized that "data on crimes by persons awaiting trial is not unlike other emotionally-impacted criminal justice information in that . . . it seems to depend a great deal on who one asks." *Id.* at 274. He then goes on to conclude that by doubling the above figures, "*it seems reasonable to estimate* that about 22 percent of all defendants commit crimes while awaiting trial and that this figure climbs to 50 percent for the 'dangerous' group . . . ." *Id.* The problem with the data as set forth, is that it is the product of "functional guesses," *id.* at 270, and postulations with very little factual evidence to back it up. Senator Ervin has a different interpretation of the same study: "The study shows that, overall, 17 percent of all persons charged with a felony and released on bail are rearrested, but only 7 percent are rearrested for a second felony. When these persons are considered according to the distinctions of 'violent-nonviolent' crimes . . . only 5 percent of those originally charged with a violent crime are rearrested for another violent crime." 116 CONG. REC. 10825 (1970). Senator Ervin points out: "It must be stressed that these figures are for *arrest only*, and arrest is not the equivalent of a determination of guilt. It is only a determination by the police that there is probable cause to arrest. . . . Applying [the] conviction rate [66-2/3 percent] against the rearrest figures, we get true recidivism rates of 6 percent for all felonies, less than 4 percent for 'violent' crimes, and less than 4 percent for 'dangerous' crimes." *Id.* (emphasis added). "In practical terms, this means that under [a] preventive detention scheme, a judge will have to find the one person out of every 16 who will recommit a felony, the one person out of every 25 who will commit a second so-called violent crime, and the one person out of every 25 who will commit a second so-called dangerous crime." *Id.*

Of course the necessary implication of the above figures is that there is a great likelihood that *innocent* people will suffer wrongful detention. Although there are other studies of preventive detention, the particular study referred to merits study for at least one major reason—initially it was intended to show the need for preventive detention, while in fact it apparently revealed a quite different story. Indeed, the Bureau of Standards study in its executive summary warned: "The reader is particularly cautioned against a casual use of the averages reported in this executive summary, since the richness of the narrative supporting material in the court records and the judgmental decisions of persons in the administration of justice require an interpretive summary to accompany each result. The reader is urged to probe deeply in the body of the report to insure proper interpretation and use of the numerical results presented here." NATIONAL BUREAU OF STANDARDS, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: A PILOT STUDY 535 (1970).

sion of the merits or disadvantages of preventive detention. However, since preventive detention in California, as well as other states which have similar constitutional bail provisions, can only be implemented by constitutional amendment it becomes necessary to consider whether that alteration of our basic system is advisable. In order to justify a constitutional amendment it is submitted that it must clearly be shown that preventive detention is not in violation of federal constitutional rights, that it is necessary to protect society, and that it is in fact effective.

The objection to preventive detention has primarily centered around its possible violation of the Eighth, Fifth, and the Sixth Amendments to the United States Constitution.[104] However, there are also a number of practical reasons for opposition to it. First, the preventive detention procedures would add additional burdens to a court system already near the breaking point. Second, preventive detention would swell the jail population with untried individuals. Third, it would merely cover up inadequacies within our judicial system and lead to further unwise and harmful delay in seeking real solutions to the problem of crime. Finally, it is simply impossible to predict accurately which of the persons arrested will commit further crimes if released.[105]

One of the most serious practical effects of preventive detention is the impact that it has on the individual. If two men are convicted of the same crime and appear before the same judge for sentencing, the mere fact that one has been a free man up to that point and the other in jail since arrest should not affect the punishment that either receives. Yet there is a steadily accumulating body of evidence showing that it does; *i.e.*, that persons released on bail are more likely to be released on probation than are detained persons.[106] Moreover, authori-

104. *See, e.g.*, 116 CONG. REC. 18840 (1970) (remarks of Senator Young).

105. *See generally* Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631 (1964); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970). A study of recidivist defendants showed that apparently there was no discernable pattern upon which a judge could rely in determining whom to release. *Hearings on Amendments to the Federal Bail Reform Act of 1966 Before the Subcom. on Const. Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (testimony of P.M. Wald). This leads to the conclusion that since the judge cannot accurately predict who might be a recidivist defendant (and hence a danger to society), then nothing can possibly be gained by giving him that discretion.

106. *See, e.g.*, The Bail Reform System of the District of Columbia, Report of the Committee on the Administration of Bail of the Junior Bar Section of the Bar Association of the District of Columbia 40 (1963) (25% of bailed people and 6% of detained sample got probation); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report On The Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 87-88 (1963) 59% of defendants with pretrial release on own recognizance were found not guilty, 23%

ties recognize that pretrial detention impairs adequate preparation for trial; thus, detained defendants are more likely to be convicted because of an inadequate defense. A defendant free on bail or on his own recognizance can make good use of his time preparing for trial by locating witnesses favorable to his defense, by tracking down evidentiary leads, and by assisting his attorney in time-consuming pretrial preparation.[107]

Suffice it to say that given some definitely known facts, some realistic assumptions and certain fundamental rights, we should strive to find alternatives that are more viable than preventive detention. The effectiveness of preventive detention is doubtful; its constitutionality is questionable and its impact on society in general should cause apprehension. There are other ways to shorten the time between arrest and trial and to supervise the accused who may be dangerous—the goals of preventive detention. These are the preferable alternatives—the ones which do not involve the potential abuses of individual rights that mark preventive detention.

**Civil Commitment**

Most proponents of preventive detention point in particular to suspects who have problems associated with narcotics, mental stability or chronic alcoholism. These particular persons seem to pose one of the clearest threats to the public safety, and the proponents argue that they should be preventively detained. If the magnitude of their problems is such that they pose a danger to society, then they also probably pose a threat to their own well-being and safety. If this is true, there is a statutory remedy that *is* constitutionally sound—civil commitment. However, as was said in *People v. Smith*:[108]

> [While] a state [generally] need only show a rational connection between distinctions drawn by a statute and the legitimate purpose thereof to uphold its constitutionality . . . *closer scrutiny* is afforded a statute which affects a fundamental interest. The state's power to order the involuntary commitment of a person suspected of being a danger to the public is a proper case in which to impose upon the state the more onerous burden of demonstrating that there exists a compelling interest and that the distinction is necessary to further that purpose.

If it is remembered that these commitment statutes are of a civil

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of detained defendants were found not guilty; prison sentences were given to 21% of defendants with pretrial "own recognizance" and to 96% of detained defendants).

107. *See, e.g.*, Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1051-52 (1954) (only 52% of bailed defendants were convicted while 82% of jailed defendants were convicted).

108. 5 Cal. 3d 313, 318-19, 486 P.2d 1213, 1217, 96 Cal. Rptr. 13, 17 (1971) (emphasis added).

nature[109] and not to be used as a criminal punishment, then their implementation may be used to protect the individual as well as having the effect of protecting society. Of course applicable due process standards must be followed and the defendant (or more properly perhaps the "patient") is entitled to a judicial hearing.[110]

Clearly, however, these civil commitment proceedings have very limited application and do not offer a general alternative to preventive detention to keep society safe from truly dangerous persons. The hired gun, the racketeer and other professional criminals probably could not be reached constitutionally through these provisions. The basis of such statutes is that the danger to society must result from the mental disorder[111] and usually the arresting officer is not aware of suf-

109. Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966). If it is civil commitment then detention is not unconstitutional and there is no denial of criminal justice, because the basic premise of such a proceeding is that the accused is so sick that he is not responsive to the deterrence provided by criminal law and thus cannot be dealt with within criminal procedure. *See also* People v. Lipscomb, 263 Cal. App. 2d 59, 69 Cal. Rptr. 127 (1968); People v. Gonzales, 256 Cal. App. 2d 50, 63 Cal. Rptr. 581 (1967).

110. Statute provides that "[w]hen any person, as a result of mental disorder, is a danger to others, or to himself" he may be taken into custody and placed in a facility for 72-hour treatment and evaluation. CAL. WELF. & INST'NS CODE § 5150 (West 1972). There must be reasonable cause to detain the person and an application in writing stating the circumstances is required. Each person thus admitted shall receive the evaluation and treatment as soon as possible and shall be released within 72 hours if the person no longer requires treatment and evaluation. *Id.* § 5252 (West Supp. 1973). If he requires additional treatment he may be certified for not more than 14 days of involuntary treatment. *Id.* § 5250. Once again the statute provides that if the person improves sufficiently for him to leave, he must be released and in any event must be released prior to 14 days. *Id.* § 5254.

Sanctions are placed on officials who wrongfully detain persons entitled to release by imposing civil liability. *Id.* § 5255. Criminal or civil liability may be imposed upon one seeking such a petition with knowledge that the person does not pose a danger to himself or others. *Id.* § 5203. This provision would obviate the subterfuge of detaining persons under this statute strictly for purposes of preventive detention. In addition, the person has other safeguards, primarily the right to habeas corpus and the right to counsel. *Id.* § 5252.1.

If after or during the 14 day period the person attempts or threatens suicide while under treatment he may be kept for an additional 14 days. *Id.* § 5260. If at the end of that 14 day period he has threatened, attempted, or inflicted physical harm on another, he can be kept an additional period, not exceeding 90 days. *Id.* § 5300. There are similar provisions for chronic alcoholics and narcotics addicts. *See generally* Note, *Control and Treatment of Narcotics Addicts: Civil Commitment in California*, 6 SAN DIEGO L. REV. 35 (1969); Belton, *Civil Commitment of Narcotics Addicts in California: A Case History of Statutory Construction*, 19 HASTINGS L.J. 603 (1968); George, *Due Process in Protective Activities*, 8 SANTA CLARA LAW. 133 (1968); People v. Myers, 6 Cal. 3d 811, 494 P.2d 684, 100 Cal. Rptr. 612 (1972); *In re* Marks, 71 Cal. 2d 33, 453 P.2d 441, 77 Cal. Rptr. 1 (1969); People v. Superior Court, 21 Cal. App. 3d 911, 98 Cal. Rptr. 894 (1971).

111. CAL. WELF. & INST'NS CODE § 5150 (West Supp. 1973).

ficient facts to warrant commencing proceedings under the provisions. Even assuming that a peace officer did take the person into custody as a person dangerous because of a mental disorder,[112] that would only be a delaying tactic if the person did not in fact suffer from a mental disorder.

## A Proposed Alternative: Conditions

The rising crime rate in this country indicates that the elimination of crime must be given increased attention. Because that need is so great, however, we must be careful not to overreact and infringe on the rights of all citizens for years to come. Instead of a slipshod solution to the problem, greater emphasis should be placed on realistic alternatives to imposing preventive detention.[113]

The most realistic alternative is to put conditions on bail. This may well be the most effective way of preventing a defendant from fleeing as well as serving as a deterrent to future criminal acts. Of course, such conditions must protect the interests of society while preserving the defendant's fundamental right to bail. It is submitted that imposition of any conditions necessary to accomplish these goals would be preferable to pretrial incarceration.

The conditions must be tailored to the circumstances of the case. Factors such as family ties in the area, employment, financial security, and property holdings of the accused would be relevant in determining the number of conditions needed and their stringency. Either the legislature or the trial courts could prescribe such conditions on pretrial release. There are values of public order and social welfare which constitutionally justify some qualification on bail freedom by way of the police power of the state.

Examples of the conditions which could be placed on bail are as follows: release into custody of the family; a requirement to report weekly to an officer of the court, a clergyman, a doctor, or other professional person; or a requirement that the accused seek employment or continue at his present job. One or all of the conditions could be imposed, depending on the facts of the case. For "grave" felonies, further conditions could be imposed relinquishment of a passport, geographical limitations on travel, and even a requirement to sleep in

112. *Id.* § 5213 (West 1969).

113. Ervin, *Foreward: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 291 (1971). Senator Ervin in discussing the District of Columbia Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, points out what can happen when "politics, public fear, and creative hysteria join together to find a simple solution to a complex problem." *Id.* at 292. (The provisions relating to preventive detention are found in D.C. CODE ANN. §§ 23-1321 to -1332 (1970)).

jail. If intimidation of witnesses is a problem, the defendant should be prohibited from any contact at all with such witnesses.

There are, of course, constitutional limits to the above and it must be understood that the implementation of such conditions cannot abrogate the basic right to bail. For example, requiring a defendant to spend each night in jail might well be valid, but if he were only released five hours a day it would be of questionable constitutionality; and if he were released only one hour a day it would certainly be an unconstitutional abrogation of his right to bail.[114]

There are very few cases involving conditions placed on bail because such a procedure is not used to any great extent at present. However, it appears that if the conditions are reasonable, realistic and relevant to the case at hand, it would be within the police power of the state to impose them.

The major shortcoming with the above proposal is the problem of what course to take if the accused violates the conditions of his bail. In the extreme, what if he says he will not abide by any of them, arguing that his entitlement to bail is a matter of right? There are two possible theories under which such a defendant's bail may be revoked: first, by knowingly violating conditions of bail he has waived his right to bail; and second, by violating the conditions he has disrupted the judicial process, an acceptable ground for denying bail or revoking it.[115]

However, even if these two sanctions are constitutionally suspect, there could be other remedies. Perhaps even more desirable than revoking bail as "punishment" for violating conditions, the defendant may be deterred from doing so by imposition of criminal sanctions for such violations. Thus, he could face additional punishment for criminal contempt. Another effective alternative would be to make bail violations a separate substantive offense. This would leave his initial right to bail constitutionally guaranteed. If there is any deterrent value at all in making acts criminal and providing for punishment, it would be present here.

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114. *Cf.* Rehman v. California, 85 S. Ct. 8 (1964) (Douglas, Circuit J.), where it was ruled an unconstitutional violation of due process to take away a doctor's medical license as a condition to his being released on bail.

115. Advisory Committee on Pretrial Proceedings, REPORT TO THE AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE § 5.6 (Approved Draft 1968); *cf.* Illinois v. Allen, 397 U.S. 337, 343 (1970): "defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." His disruption of the judicial process in this case prevented him from exercising his right of confrontation. By analogy, this reasoning could apply to the defendant who continues to violate the conditions of his bail.

For an example of how the above system could work the following model may be examined: John Doe, as a condition for release, is required to report once a week to an officer of the court. He is made well aware of possible criminal sanctions for his willful failure to comply.[116] If he willfully fails to report, he could be rearrested and charged with an additional substantive crime—violation of conditions of bail. However, because he is still entitled to bail he must be released, but now it becomes permissible to stiffen the conditions (*e.g.*, report to officer of the court once each day). In addition, the possible ramification for a subsequent violation could be a more severe *substantive* penalty (*e.g.*, one year for first violation, two years for second violation). Of course, if it is obvious that he will continue to violate the conditions of his bail, the judicial recourse would be to have a hearing with appropriate due process and to try the individual on the substantive offense immediately.

Once this type of program is implemented there would, of course, be fewer persons in jail. As shown by studies,[117] defendants, if released, have a better chance of not being convicted because they can better prepare their defenses; if convicted, such persons often make a respectable showing that their subsequent imprisonment would serve no useful purpose. If this is true it is certainly a desirable goal. It could also have the valuable side effect of expediting the judicial process. As a result, court calendars would not be so congested, and the person who violated the conditions of his bail could be moved up on the calendar and his case dispensed with much sooner.

As an additional deterrent against crimes committed while on bail, the possible punishment for further crimes could be increased if committed by one on bail. In all these situations the effect would not be the initial denial of bail. Rather, when the defendant finally comes to trial he could be tried on two or more counts; *i.e.*, the original offense, the subsequent crime or offense, plus possible additional punishment for "jumping bail" or violating conditions of bail. In other words the defendant, if thoroughly advised of the possible penalties he faces if he jumps bail, commits another crime, or violates the conditions of bail, will ask himself, "Is the game worth the candle?" It is submitted that in most cases he will answer "No!"

Since the effectiveness of pretrial detention is highly suspect, further study should definitely be conducted. Obviously, as long as people are detained it can be shown that they are not committing any further crimes. More realistically, however, a program could be set up as follows: Take the least dangerous offense first. Release all persons

116. It is extremely important to advise the defendant fully of the sanctions as deterrence would be the sole purpose of the additional offense.

117. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

arrested for such crime, without money bail, but with necessary conditions attached. Then chart their progress until final termination of their case to see if they should have been detained. If the statistics show that there was no correlation between their initial arrest and their subsequent conduct,[118] then the program could be expanded to include other crimes. By so doing, we could at least have some reliable figures on the nature of subsequent offenses, and the rates of recidivism; in short, we would know whether the system is working or not.

If as a result of such studies it is clearly shown that pretrial release is *not* working and that we *can* accurately predict who will commit the future crimes, then preventive detention may have to be used. However, only after such an experiment is implemented can we gauge the efficacy of preventive detention as a protective concept.

This leads to the final alternative—constitutional amendment of bail clause followed by legislative enactment. If it is reliably determined that the danger posed to society is so great that preventive detention is the only viable answer, then the right to bail can be abrogated or modified by inclusion into the constitution of certain exceptions to that right. This has been done in some states for specific situations[119] and could be effectuated in those jurisdictions with a right to bail in all noncapital cases, like California.

## Conclusion

The constitution of California and some thirty-eight other states deal specifically with the subject of bail, deeming it a matter of right in all noncapital cases and even in capital cases where the proof is not evident nor the presumption great. States that have adopted this provision did so in light of the realization that arbitrary or unreasonable restrictions and denials of bail were typical examples of the invasion of personal liberty by the British Crown which the American colonists found intolerable. In fact, every state with such a provision included it in its bill of rights or declaration of rights; it was considered that fundamental.

The meaning of the bill of rights cannot be changed by legislative enactment or judicial fiat. It can only be altered by changing the con-

118. Studies tend to indicate that there is no correlation or at least that it would have been impossible to predict.

119. *E.g.*, ARIZ. CONST. art. I, § 22, where in addition to providing for the exception for capital offenses, it is provided that bail may be denied to those accused of "[f]elony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge." In Florida, the additional exception to bail as a matter of right is for "an offense punishable by life imprisonment." FLA. CONST. art. I, § 14 (1968 rev.); Donaldson v. Sack, 265 So. 2d 499, 504 (Fla. 1972).

stitution itself—a process which must be accomplished by the people. This was the realization of the California Supreme Court in the *Underwood* case. The court's elimination of the "public safety exception" which had crept into the law is thus quite sound.

Justice McComb, now of the California Supreme Court, said:

> The people of the State of California through their Constitution have provided in Article I, Section 6, that "[*A*]*ll persons* shall be bailable by sufficient sureties, unless for capital offenses . . . ." This mandate of the people cannot be legally set aside by the civil, legislative or judicial branch of the government. It will be observed that the people, who are sovereign, have seen fit to provide that with but one exception, to wit, where a person has been charged with a capital offense, *all persons* are entitled to bail as a matter of right.[120]

And in conclusion, Justice McComb stated:

> Irrespective of the villainy of the accused or the heinousness of his offense, without regard for public opinion, or for the personal views of an individual officer as to the wisdom of the constitutional provision [regarding bail] such provision is binding without qualification upon the courts until the people have by inherited processes legally erased the constitutional mandate.[121]

Preventive detention has not been proven to be such an effective or responsible alternative to crime prevention as to justify the shedding of rights which would affect each person in our society. Pretrial incarceration is a regressive solution to the complex problem of crime in America; far less onerous solutions exist. By allowing the greatest number of persons possible free on bail *with conditions attached thereto*, we not only assure their presence at trial, but we also protect the favored and fundamental rights of the accused. Such a course is both feasible and just.

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120. *In re* Keddy, 105 Cal. App. 2d 215, 219, 233 P.2d 159, 162 (1951) (emphasis in original).

121. *Id.*

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